

No. 77-959

Supreme Court, U. S.

**FILED**

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**In the Supreme Court of the United States**

**OCTOBER TERM, 1977**

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**ISAAC NEWTON HULVER, PETITIONER**

**v.**

**UNITED STATES OF AMERICA**

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**ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE EIGHTH CIRCUIT**

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. A1-A11) is reported at 562 F. 2d 1132. The district court's order denying the motion of the United States for partial summary judgment (Pet. App. A56-A66) is reported at 393 F. Supp. 749. The district court's final judgment (Pet. App. A50-A55) and its supplemental findings of fact and conclusions of law (Pet. App. A12-A49) are unreported.

**JURISDICTION**

The judgment of the court of appeals was entered on September 14, 1977, and a timely petition for rehearing was denied on October 12, 1977. The petition for a writ of certiorari was filed on January 4, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding clearly erroneous the district court's factual findings with respect to the time of accrual of petitioner's claims.
2. Whether the court of appeals misapplied the "discovery" rule for the accrual of malpractice claims.
3. Whether the court of appeals improperly declined to apply the "continuous treatment" doctrine to toll the accrual of petitioner's claims.

### STATEMENT

On October 17, 1968, petitioner underwent an operation in the Kansas City, Missouri, Veterans Administration Hospital to relieve an arterial condition that was progressively crippling his right leg. As a result of the operation, petitioner's right leg was relieved of disability, but his left leg was left numb, cold and crippled, and his sexual function was impaired. A second operation was conducted on December 12, 1968, in an effort to correct the left leg condition, but it proved unsuccessful. Petitioner was then assigned to a different VA physician, who attempted to correct petitioner's leg condition by further surgery on March 10, 1969, but that effort also failed (Pet. App. A19).

Petitioner filed an administrative claim under the Federal Tort Claims Act on February 18, 1971, more than two years after the first and second operations. That claim was denied, both on the merits and as untimely. Petitioner then filed this action in the United States District Court for the Western District of Missouri. He alleged that the first operation had exceeded the scope of his consent by involving the arteries leading to the left as well as the right leg and that it had been negligently performed (Pet. App. A12-A13). The United States denied the allegations and

affirmatively defended on the ground that both claims were barred by the two-year limitations period in the Federal Tort Claims Act, 28 U.S.C. 2401(b).

The district court held that the surgeon who performed the first operation had negligently disregarded petitioner's instruction to restrict the scope of the operation to arteries affecting his right leg and had failed to warn petitioner of the possibility of sexual impairment resulting from the operation (Pet. App. A45). The court found the suit timely, holding that the statute of limitations had not begun to run until substantially after the initial operation (Pet. App. A41-A42).

With respect to the claim based on petitioner's impotence, the court found that petitioner was not informed of the cause and permanent nature of his impairment until after his March 10, 1969, operation. It was only then, the court concluded, that petitioner was on notice of sufficient facts that in the exercise of reasonable diligence he should have discovered the surgeon's breach of duty to advise him of the risk of permanent sexual impairment (Pet. App. A39).

As to the claim of injury to petitioner's left leg, the court found that petitioner did not discover until January 1971 that a separate incision had been made in his left iliac artery. Only at that point, the court found, was petitioner on notice of facts sufficient to alert him that the disability of his left leg was not simply a normal complication of the operation to which he had consented. The court also concluded that it would have been unreasonable for petitioner to have initiated an investigation into possible acts of malpractice prior to April 15, 1969, when his treatment at the V.A. hospital terminated (Pet. App. A40).



On an appeal limited to the statute of limitations question, the court of appeals reversed. The court found (Pet. App. A6) that the evidence relating to petitioner's claim of sexual impairment

clearly and conclusively demonstrates that the plaintiff had sufficient information prior to December 1968 that his sexual functions were severely impaired and that such impairment was caused by the severing of a nerve during the October operation and that such damage was likely irreparable.

The evidence relating to the violation of petitioner's limited consent, the court of appeals found, established that, prior to February 1969, petitioner was in possession of sufficient facts to put a reasonable person on notice that the doctor may have negligently extended the operation beyond the scope of petitioner's consent. The district court's contrary findings, the court held, were clearly erroneous (Pet. App. A8-A9).

The court of appeals also rejected the district court's ruling that the statute of limitations was tolled throughout the period that petitioner was under treatment at the V.A. hospital, holding that the "continuous treatment" doctrine does not apply where, as here, the patient changes doctors in the midst of that treatment (Pet. App. A9-A10). Consequently, the court of appeals held that petitioner's administrative notice was not filed within two years of the accrual of his cause of action, and that his action was barred.

#### ARGUMENT

1. Petitioner first contends (Pet. 14-18) that the court of appeals improperly overturned the district court's findings of fact, in violation of Fed. R. Civ. P. 52(a). This

contention does not raise an issue of sufficient general importance to warrant review by this Court. In any event, the decision of the court of appeals is correct. Petitioner knew immediately after the first operation that something had gone wrong, and the two-year limitations period therefore began to run immediately. The evidence plainly showed that petitioner discovered both the nature and the cause of his loss of sexual function within a month of the October 1968 operation (Pet. App. A6); on November 20, 1968, the physician told petitioner that his impotence might have resulted from the severing of some nerves during the arterial operation. On the same day petitioner filed an application with the VA for an increased disability rating because of the problem; the application listed the October 1968 operation as "the cause of this disability" (*ibid.*).

Moreover, petitioner admitted at trial that he realized immediately after he recovered from the anesthesia that the October 1968 operation had affected his left leg and that he had told others shortly afterwards that his consent to the surgery had been violated (Pet. App. A8). Petitioner testified that he confronted the physician immediately after the first operation, asking why "after I had told him not to" he had "fool[ed] with the left side." The court of appeals therefore was fully justified in concluding that no later than November 1968 petitioner had "possession and knowledge of facts sufficient to alert a reasonable person that there may have been negligence relating to the grievance for which the complaint was subsequently made" (Pet. App. A8-A9; footnote omitted).

2. Petitioner further argues (Pet. 18-22) that the decision here conflicts with cases holding that the limitations period does not start to run until the plaintiff discovers or reasonably should have discovered both his injury and the cause of the injury. In this case, petitioner

asserts, the court of appeals looked only to the time that petitioner discovered his injuries, not to the time that he discovered their cause.

Petitioner misinterprets the opinion of the court of appeals. The court employed precisely the test that petitioner proposes, and it found that petitioner knew or was put on inquiry about the nature of his injuries and their causes prior to December 1968. By that time, he knew that his sexual impairment was probably permanent and that it had probably been caused, as the doctor admitted, by the severing of some nerves during the first operation. And he knew by that time that the injury to his left leg had been caused by the doctor's failure to follow his instruction not to extend the operation to the left leg artery. The decision of the court of appeals was thus in accordance with well-settled principles of law.

3. Finally, petitioner maintains (Pet. 22-25) that the court of appeals should have applied the "continuing treatment" doctrine to toll the limitations period until petitioner ceased being treated by any V.A. physician. There is no merit to this claim. First, the "continuing treatment" doctrine applies only to cases in which the plaintiff does not actually discover the acts of malpractice complained of; it never postpones the accrual of the claim beyond the time the plaintiff actually discovers the malpractice. *Reilly v. United States*, 513 F. 2d 147 (C.A. 8). Here, the court found that petitioner discovered the alleged malpractice long before he left the care of V.A. physicians.

In addition, petitioner's invocation of the "continuing treatment" rule fails under the principles of an unbroken line of cases holding that a patient should not be permitted to postpone inquiry into possible acts of malpractice after he terminates his relationship with the

physician responsible for the injury. *Brown v. United States*, 353 F. 2d 578, 580 (C.A. 9); *Ciccarone v. United States*, 486 F. 2d 253, 257 (C.A. 3); *Ashley v. United States*, 413 F. 2d 490, 493 (C.A. 9). Petitioner terminated his relationship with his first physician at the end of 1968 (Pet. App. A2), more than two years before he filed his administrative claim.

#### CONCLUSION

The petition for a writ of certiorari should be denied.  
Respectfully submitted.

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